IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1913

CHARLES HABRON; WILLIAM ESCH; FRANK GLORIOSO; RUDY SPENCER; JOHN SIGLER, JR.; AND WALTER HAWSE,

Appellants,

v.

HARVEY A. EPSTEIN, COMMISSIONER OF LABOR AND INDUSTRY OF THE STATE OF MARYLAND; AND BALTIMORE BUILDING AND CONSTRUCTION TRADES COUNCIL,

Appellees.

ON APPEAL FROM A DECISION OF A THREE JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

FRANCIS B. BURCH,
Attorney General,
State of Maryland,
FRANCIS X. PUGH,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
Counsel for Appellee,
Harvey A. Epstein,
Commissioner of Labor
and Industry of the
State of Maryland.

The Daily Record Co., Baltimore, Md. 21202

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The Appellee, Harvey A. Epstein, Commissioner of Labor and Industry of the State of Maryland, pursuant to Rule 16 of the United States Supreme Court, moves this Honorable Court to affirm the final judgment and decree of the district court upon the grounds that the issues raised by the Appellants do not amount to a substantial federal question and that further argument in this matter is not necessary.

STATEMENT OF THE CASE

In 1969, the Maryland Legislature enacted the "Contracts For Public Works Law", which is presently codified in Article 100, Section 96 *et. seq.* of the Annotated Code of Maryland (1964 Replacement Volume, 1975 Cumulative Supplement). Thereafter, in 1973, the Legislature amended that statute by adding Section 105A entitled "Employment of Apprentices" which became effective July 1, 1973. Section 105A specifically precludes the use of "helpers" on all State public works projects:

> "No person classified as a helper or trainee shall be employed on public works. Only apprentices in a trade, craft or occupation for which an apprenticeship program has been approved by the apprenticeship and training council of the Department of Licensing and Regulation shall be employed on public works. Each apprentice employed on a public works shall be paid not less than the percentages, as set forth in such approved apprenticeship program, of the journeyman mechanic's prevailing hourly rate of wages as determined by the Commissioner of Labor and Industry for such journeyman mechanic in the trade, craft or occupation in which the apprentice is employed on the public works."

The Appellants, Charles Habron, William Esch, Frank Glorioso, Rudy Spencer, John Sigler, and Walter Hawse, instituted this action in the United States District Court for the District of Maryland on November 27, 1974 by filing a Complaint and Petition for Declaratory Decree and Motion to Convene a Three-Judge Court, challenging the constitutionality of Section 105A insofar as that statute prohibited them, in their capacity as helpers, from working on public works projects in the State of Maryland. Thereafter, on or about December 12, 1974, the Appellants, with the

consent of the Appellee, Harvey A. Epstein, filed an Amended Bill of Complaint and Petition for Declaratory Decree requesting injunctive relief from the enforcement of Section 105A. In their complaint, the Appellants contended that as a result of the enactment and enforcement of Section 105A, they "will continue to be deprived from working on public works projects of the State of Maryland thereby impairing their ability to earn their livings and support themselves and their families . . .". To date, the Appellants have suffered no monetary loss as a result of the enactment of Section 105A but assert that the helper prohibition could cause them monetary losses in the future. See Stipulation of Facts, Paragraphs 1-6 (Docket No. 37).

The Appellee, Harvey A. Epstein, is Commissioner of Labor and Industry for the State of Maryland and is charged under the "Contracts For Public Works Law" with the enforcement and administration of Section 105A.

The Appellee, The Baltimore Building and Construction Trades Council, was granted leave to intervene in these proceedings as a Defendant after the district court found that the Council had a substantial interest in the subject matter of the proceeding. The membership of the Council is composed of numerous construction trade unions located in the State of Maryland whose programs and policies the Council implements, organizes and supports. One such program has been the implementation of apprenticeship training for its members.

On or about April 21, 1975, the International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile Helpers and Finishers,

Marble Setters Helpers, Marble Mosiac and Terrazzo Workers Helpers was granted leave to intervene as plaintiffs to this proceeding.

In a Stipulation of Facts filed by all parties to this proceeding, it was stipulated and agreed upon that "apprentices and helpers are two distinct types of workmen, with different job descriptions and different training programs". See Stipulation of Facts, Paragraph 9 (Docket No. 37). This basic occupational distinction is clearly borne out in the occupational definitions of "helper" and "apprentice" contained in the *Dictionary of Occupational Titles* published by the U.S. Department of Labor, which were made a part of the Stipulation of Facts:

> *"Helper (any ind.).* A worker who assists another worker, usually of a higher level of competence or expertness, by performing a variety of duties, such as furnishing another worker with materials, tools, and supplies; cleaning work area, machines, and equipment; feeding or off-bearing machine; holding materials or tools; and performing other routine duties. A HELPER may learn a trade but does so on his own without an agreement with his employer that such is the purpose of their relationship. Consequently, the title HELPER is some times used as synonym for APPRENTICE, a practice that is incorrect technically. A worker whose duties are limited or restricted to one type of activity, such as moving materials from one department to another, feeding machines, removing products from conveyors or machines, or cleaning machines or work areas is not technically a HELPER and is classified according to duties performed as MATERIAL HANDLER: MACHINE CLEANER: PORTER II. A worker who performs a variety of duties to assist another worker is a HELPER technically and is classified according to worker assisted as BRICKLAYER HELPER (const.); DRYCLEANER HELPER (clean., dye., & press.)

> *"Apprentice (any ind.).* A worker who learns, according to a written or oral contractual agreement, a recognized skilled craft or trade requiring two or more years of on-the-job training through job experience supplemented by related instruction, prior to time that he may be considered a qualified skilled worker. APPRENTICES are seldom over 30 years of age. High school or vocational school education is generally a prerequisite for entry into an apprenticeship program. Provisions of apprenticeship agreement regularly include length of apprenticeship; a progressive scale of wages; work processes to be taught; and amount of instruction in subjects related to the craft or trade, such as characteristics of materials used, selected shop mathematics, and blueprint reading. Apprenticeability of a particular craft or trade is best evidenced by its acceptability for registration as a trade by a State apprenticeship agency or the Federal Bureau of Apprenticeship and Training. Generally, where employees are represented by a union, apprenticeship programs come under the guidance of joint apprenticeship committees composed of representatives of the employers or the employer association and representatives of the employees. These committees may determine need for APPRENTICES in a locality and establish minimum apprenticeship standards of education, experience and training. In instances where committees do not exist, apprenticeship agreement is made between APPRENTICE and employer, or an employer group. The title, APPRENTICE, is often loosely used as a synonym for beginner, HELPER, or LEARNER. This practice is technically incorrect and leads to confusion in determining what is meant. Typical classifications for APPRENTICES are BLACKSMITH APPRENTICE (forging); MACHINIST APPRENTICE (mach. shop); PLUMBER APPRENTICE (const.)."

A statutory three-judge court having been convened, an evidentiary hearing was held on November 20 and

21, 1975, wherein all parties to the proceeding presented evidence concerning the enforcement and implementation of Section 105A.

On April 6, 1976, the Court issued its Opinion and Order dismissing the Appellants' Petition for Declaratory Judgment.

On May 4, 1976, the Appellants, Walter Hawse and John Sigler, Jr., filed an appeal to this Court from the Order of the Three-Judge Court entered on April 7, 1976. Thereafter, on May 6, 1976, the Appellants, Charles Habron, Rudy Spencer, Frank Glorioso, and William Esch filed an appeal to this Court from that same Order. The Plaintiff, the International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile Helpers and Finishers, Marble Setters Helpers, Marble Mosiac and Terrazo Workers Helpers has not appealed that Order.

On July 2, 1976, the Appellants filed a jurisdictional statement with this Honorable Court.

ARGUMENT

In the course of its equal protection analysis, the district court, relying upon substantial case law, concluded that the right to seek employment, unfettered by governmental regulation, was neither a fundamental right nor an area of suspect classification. Recognizing that the courts have never subjected purely economic legislation to the "strict scrutiny" or "compelling state interest" standard of review, that court applied the "lower scrutiny" or "rational basis" test in its analysis. See for example, *Two Guys from Harrison — Allentown, Inc., v. McKinley,* 366 U.S. 582, 81 S. Ct. 1135 (1960); *Allied Stores of Ohio v. Bowers,* 358 U.S. 622,

79 S. Ct. 488; *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 69 S. Ct. 463 (1948); *Lindsley v. Natural Carbonics Gas Company,* 220 U.S. 61, 31 S. Ct. 337 (1910); *Snell v. Wyman,* 281 F. Supp. 853, 867, affirmed., 393 U. S. 223, 89 S. Ct. 553 (1968). As an additional basis for the application of the "rational basis" analysis, the lower court relied upon numerous cases which had applied that standard of review to state economic legislation which placed limitations on the availability of employment opportunities. *Goesaert v. Cleary,* 335 U.S. 464, 69 S. Ct. 198 (1948); *Kotch v. Board of Riverport Pilot Commissioners,* 330 U. S. 552, 67 S. Ct. 910 (1947); *Flemming v. Nestor,* 363 U. S. 603, 80 S. Ct. 1367 (1959), reh. den. 364 U. S. 864, 81 S. Ct. 29 (1960).

Having determined that the "rational basis" test was the applicable standard of review, all three judges of the district court, in their search for the most fully developed and formulated pronouncement of that test, turned to *McGowan v. Maryland,* 366 U.S. 420, 81 S. Ct. 1101 (1961):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. *A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Id.* at 425, and 1105 (Emphasis added).

The vitality of the *McGowan* test remains unchallenged. See *Weinberger v. Salfi,* _____ U.S. _____, 95 S. Ct. 2457, 2469 (1975); *Fuller v. Oregon,* 417 U.S. 40, 48, 94 S. Ct. 2116, 2122 (1974); *Hagans v. Levine,* 415 U.S. 528, 541, 94 S. Ct. 1372, 1381 (1974); *Ortwein v. Schwab,* 410 U.S. 656, 660, 93 S. Ct. 1172, 1175 (1973); *Jefferson v. Hackney,* 406 U.S. 535, 546, 92 S. Ct. 1724, 1731 (1972); reh. den. 409 U.S. 898, 93 S. Ct. 178 (1973); *Sayler Land Company v. Tulare Lake Basin Water Storage District,* 410 U.S. 719, 93 S. Ct. 1224 (1973); *Hooban v. Boling,* 503 F.2d 648, *cert. denied* 461 U.S. 920 (1975); *Dandridge v. Williams,* 397 U.S. 471, 90 S. Ct. 1153 (1970); *San Antonio Independent School District v. Rodriguez,* 411 U.S. 51, 93 S. Ct. 1278 (1973); and *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S. Ct. 1404 (1969).

Of the aforementioned citations, *Dandridge v. Williams, supra,* in reaffirming the *McGowan* doctrine, most clearly set out the principles of analysis to be utilized in the area of economic and social welfare regulation:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S. Ct. 337, 340, 55 L. Ed. 369. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70, 33 S. Ct. 441, 443, 57 L. Ed. 730. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393." 397 U.S. at 485, 90 S. Ct. at 1161.

See also *United States Department of Agriculture v. Moreno,* 413 U.S. 528, 93 S. Ct. 2821 (1973).

The district court, after a consideration of the extensive testimony and arguments presented by the parties to this proceeding, found that Section 105A served three legitimate purposes of the State of Maryland:

> "1. Section 105A promotes a work product produced under safer working conditions.
>
> 2. Section 105A enhances the social conditions of the state by reducing unemployment and encouraging helpers to obtain skilled training which will increase their marketability.
>
> 3. Section 105A promotes the welfare of the construction industry and the quality of the product by encouraging formalized apprentices training the results of which are: (a) more skilled craftsmen of all-round competence, (b) more skilled craftsmen who are able to work without close supervision, and (c) more skilled craftsmen who are able to adapt to constantly changing work procedures."

Based upon this finding, the district court concluded that Section 105A was "a typical state regulatory statute, apparently reasonable, not arbitrary, which has a fair and substantial relation to the object of the legislation with all similarly situated persons being treated alike". Indeed, the aforementioned Stipulation regarding the differences between the "apprentice" and "helper" bears out this conclusion. In view of the legitimate purposes found to be served by the statute, the court declared that Section 105A passes constitutional muster under the "low scrutiny" or "rational

basis" analysis as set out in *McGowan*. The Appellees assert that in view of these findings, Section 105A would have passed constitutional muster under the "strict scrutiny" or "compelling state interest" analysis if an infringement of a fundamental right or the establishment of a suspect classification existed.

The Appellants set out various reasons why they alleged that a substantial federal question has been raised by this appeal and yet are unable to point out any error in the lower court's equal protection analysis. Instead, the Appellants allege that the issue raised in this appeal is of great national importance and yet are unable to cite the enactment of any identical legislation by any of the other states. Of more importance is the fact that the constitutionality of such legislation, if found to exist, would be unquestioned due to the legitimate state interests served by such legislation. The Appellants further argue that the decision of the district court was in some way arbitrary and that the statute is unconstitutional, claiming that the basis for the prohibition of the use of helpers on public works projects is the cost of the project. The Appellees submit that the basis for the implementation of Section 105A is not the cost but the public nature of the project to be constructed.

The Appellants have also alleged that the statute is discriminatory against workers over thirty (30) years of age and yet provide no evidence to substantiate this allegation. On the contrary, there is absolutely no indication, either within the plain meaning of the words of the statute or as a result of the implementation or enforcement of the statute, to substantiate this claim.

Finally, the Appellants urge this Honorable Court to carefully scrutinize this statute since it prohibits employment in Maryland and therefore cripples the "country's economic stability". This unsubstantiated allegation is in direct opposition to the factual findings made in this case by the district court. On page 21 of their Opinion, the district court specifically found that "Section 105 enhances the social conditions of the State by *reducing unemployment* and encouraging helpers to obtain skilled training which will increase their marketability." (Emphasis supplied). The Appellees find it hard to understand this assertion of the Appellants in view of the fact that the Appellants have stipulated that they have suffered no monetary loss as a result of the enactment of Section 105A.

In view of the legitimate State interests served by Section 105A and the in depth constitutional analysis undertaken by the district court, and in view of the numerous pronouncements regarding the constitutionality of economic regulation by this Honorable Court, it is respectfully submitted that the Appellants have not raised a substantial federal question and the decision of the lower court should, therefore, be affirmed.

CONCLUSION

The Appellees respectfully submit that, in the absence of a substantial federal question to be decided, the Judgment and Decree of the District Court should be affirmed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General,
State of Maryland,
FRANCIS X. PUGH,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
Counsel for Appellee,
Harvey A. Epstein,
Commissioner of Labor
and Industry of the
State of Maryland.